

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Implementation of the  
Local Competition Provisions of the  
Telecommunications Act of 1996

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CC Docket No. 96-98

TO: The Commission

**COMMENTS OF EXCEL COMMUNICATIONS, INC.**

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## SUMMARY

Excel Communications, Inc. (“Excel”) submits that the Commission should affirm its current list of mandatory unbundled network elements (“UNEs”) that incumbent local exchange carriers (“ILECs”) must offer to entrants, as well as the legal entitlement of all carriers to obtain and use any technically-feasible combination of ILEC-supplied UNEs to provide services to end-user subscribers.

Competitive local services for residential and rural customers will not develop as intended by Congress unless the Commission adopts rules to ensure that entrants can provide local services broadly throughout the country entirely through UNE combinations supplied by ILECs at cost-based rates. Excel is the fourth largest U.S. long distance carrier, serving a primarily residential customer base that is widely-dispersed among all States and all regions (urban, suburban and rural). UNE combinations are the only viable option for Excel to provide local services as part of a one-stop-shopping package to its current (and prospective) customer base. It is infeasible for Excel to build-out last mile connectivity to serve its customer base, and the vast majority of Excel’s customers are in regions where there are no alternative network facilities. Further, after intensive study, Excel has reluctantly concluded that local exchange resale does not enable it to sustain long-term entry into the local market for the provision of one-stop-shopping services to its customers. However, if the FCC confirms and implements rules necessary for entrants to serve their customers through UNE combinations, Excel is prepared to introduce local competition rapidly and broadly throughout the United States to all types of customers in all regions of the country.

In responding to the Supreme Court’s decision in *AT&T Corp. v. Iowa Utilities Board*, 119 S. Ct. 721 (1999), the FCC should construe the “necessary” standard in Section

251(d)(2)(A) to apply only when the functionality underlying a UNE is proprietary. As a result, none of the pre-existing UNEs qualify as proprietary and the “necessary” test is inapplicable.

With respect to the “impair” standard in Section 251(d)(2)(B), the Commission should find the standard satisfied whenever denial of access to an ILEC-supplied UNE would affect an entrant’s market decisions – what market to enter, the length of the time-to-market period, what services and service packages to provide, what prices to charge, what region to serve, what type of customer to serve, whether to employ redundant facilities, and so forth. As a practical matter, the “impair” standard will be satisfied unless there is a fully-developed wholesale market that can supply sufficient external functionalities interchangeably with ILEC-supplied functionalities so that the entrant is truly indifferent to the source of its network functionalities in making important market decisions.

All UNEs on the current mandatory list satisfy the “impair” standard, and the FCC should expeditiously re-adopt them. Further, the FCC should confirm that Rule 315(b) broadly entitles an entrant to use a UNE combination to provide any service to any customer if the ILEC has provided or used that UNE combination anywhere in its network. For this right to be meaningful, the FCC must prohibit ILECs from imposing any charges on UNE combinations above and beyond the aggregate UNE rates except as necessary to recover the forward-looking economic costs of performing necessary functions efficiently.

Excel strongly supports the FCC’s proposal of uniform national rules establishing a minimum set of mandatory UNEs. Uniform national rules are necessary to provide entrants the business certainty they need to enter the local market broadly and rapidly for all subscribers and in all regions of the country. Such rules conform to the “impair” standard, and even if they did not the FCC has authority to adopt uniform national rules to promote the public interest.

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**COMMENTS OF EXCEL COMMUNICATIONS, INC.**

Excel Communications, Inc. ("Excel"), by its attorneys, hereby comments on the *Second Further Notice of Proposed Rulemaking* (FCC 99-70) [*"Second FNPRM"*] released by the FCC in the above-captioned proceeding on April 16, 1999. The FCC issued the *Second FNPRM* in response to the decision by the U.S. Supreme Court in *AT&T Corp. v. Iowa Utilities Board*, 119 S. Ct. 721 (1999). The purpose of this remand proceeding is to identify the unbundled network elements ("UNEs") that incumbent local exchange carriers ("ILECs") must provide pursuant to Sections 251(c)(3) and 251(d)(2) of the Telecommunications Act of 1996 ("1996 Act").

**Introduction**

Excel is the fourth largest long distance carrier in the United States in terms of presubscribed lines, and it is one of the fastest growing providers of telecommunications services in North America. Upon its merger with Teleglobe Inc. last fall, Excel became one of the world's foremost providers of domestic and international telecommunications facilities and services. Through resale, and increasingly through the use of its own backbone network facilities, Excel offers a full range of residential and business long distance services, as well as

Internet access, paging, 800 service, and calling card services. At the end of 1998, Excel and its affiliated companies provided service to more than four million subscribers, the great majority of whom are residential customers. *See* Affidavit of J. Christopher Dance at ¶ 2 [hereinafter “Dance Affidavit”].

It is critical that Excel have cost-based access to the entire current list of UNEs – particularly in combinations – to enter the local market in competition with the ILECs. Based on the quality and price of its long distance service offerings, Excel has built up a primarily residential customer base that is widely dispersed throughout the United States. Excel has subscribers in every State, and within each State it has subscribers spread among urban, suburban and sparsely-populated areas. Dance Affidavit at ¶ 2. It is patently impossible for Excel to build out last-mile connectivity to all of its subscribers on a ubiquitous nationwide basis, and there are no alternative providers of functionalities for the vast majority of its subscribers. Dance Affidavit at ¶¶ 4-5. Further, after months of conducting intensive operational and business analyses, Excel reluctantly concluded that its initial plan for providing local services to its current and prospective customers through local exchange resale simply did not present a viable long-term mechanism for serving its customer base. Dance Affidavit at ¶ 6. The only way that Excel can enter the local service market to provide one-stop-shopping broadly to its primarily residential customer base is through combinations of UNEs (loop, switching and transport) obtained from ILECs at cost-based rates. Dance Affidavit at ¶ 7.

Time is growing short, and the window of opportunity is beginning to close, for carriers to enter the local service market broadly throughout the country to compete against the ILECs. The industry already has lost more than three years due to the ILECs’ litigation strategy and the unfortunate (now reversed) court decision that effectively prevented Excel and other new

entrants from obtaining UNE combinations as a matter of right under the 1996 Act. Particularly as political pressure intensifies to permit Bell entry into the in-region interLATA market irrespective of their compliance with Section 271, it is imperative that competitive carriers like Excel obtain the tools they need to enter local markets throughout the United States as quickly as their business plans permit. If and when the Bell Companies obtain broad Section 271 relief, carriers who have not *already* secured a competitive foothold will find it even more difficult to enter the local market to compete against the Bells' integrated – and quite possibly predatorily priced – service offerings. In order to promote rapid nationwide entry into local markets, the FCC must affirm the current list of mandatory UNEs and the unfettered right of carriers to obtain and use UNEs in combinations. If it does otherwise based on illusory perceptions of alleged competitive alternatives for one or a few UNEs, the FCC will be condemning subscribers throughout the United States, and particularly residential subscribers, to a marketplace devoid of real competitive choices and prices for local services.

Excel urges the FCC not to read false imperatives into the Supreme Court's decision. Certainly, the ILECs will argue that the FCC must pare the list of mandatory UNEs in response to that decision. The ILECs are plainly wrong. The Supreme Court's remand is quite narrow. The Supreme Court did not criticize the FCC's list of mandatory UNEs, nor did it question the FCC's judgment that such UNEs are necessary to achieve the pro-competition objectives of Congress. Further, the Supreme Court expressly affirmed the FCC's implementation of the statutory term "network element," as well as the "all elements" rule enabling carriers to obtain and use UNEs in combinations to provide any and all telecommunications services. The sole purpose of this remand is for the FCC to infuse "some substance" into Section 251(d)(2) by adopting rules to determine when the "necessary" and

“impair” standards are, and are not, satisfied. 119 S. Ct. at 736. As Excel shows below, the FCC would comply fully with the Supreme Court’s decision by affirming the current list of mandatory UNEs as well as the ability of carriers to obtain and use UNEs in all technically-feasible combinations for the provision of local services to residential and other end-user subscribers.

### **Argument**

#### **I. THE FCC SHOULD APPLY THE “NECESSARY” AND “IMPAIR” STANDARDS, ACCORDING TO THEIR NATURAL MEANING, TO PROMOTE THE PURPOSES OF THE 1996 ACT.**

The FCC should affirm the list of mandatory UNEs that it adopted in this proceeding in 1996, and ensure that entrants are entitled to obtain and use UNEs in all technically-feasible combinations to provide telecommunications services to end-user subscribers. Excel has reviewed and fully supports the rules regarding the “necessary” and “impair” standards proposed by the Competitive Telecommunications Association (“CompTel”) in its comments filed today in this proceeding.

##### ***A. The “Necessary” Standard Applies Only When The Functionality Itself is Proprietary***

Section 251(d)(2)(A) requires the FCC, when deciding which UNEs shall be mandatory, to consider whether access is “necessary” to UNEs that are “proprietary in nature.” 47 U.S.C. § 251(d)(2)(A). The FCC should construe that provision to apply only to functionalities that are inherently proprietary. For a UNE to be proprietary “in nature,” the proprietary aspects of the UNE must be its “essential character” or its “innate disposition.” *See Webster’s New World Dictionary, Second College Edition (Simon & Schuster) at 948 (definition of “nature”).* It is not enough that an ILEC can provision a certain functionality in a proprietary



manner; the functionality itself must be proprietary. If an ILEC can choose to furnish a UNE as a non-proprietary network functionality (even if it also can choose to provide the UNE through proprietary technology), then the UNE is not proprietary “in nature” and Section 251(d)(2)(A) does not apply.

That interpretation is not only mandated by the statutory language, it is necessary to effectuate Congress’ objective of opening the ILECs’ bottleneck local exchange networks to competitive entry. If the ILECs can play keep-away with network functionalities simply by developing or using a proprietary technology, then the ILECs will have compelling incentives to abandon industry standardization in favor of unnecessary proprietary technologies simply to thwart new entrants and preserve their local monopolies. Congress did not mean to create a new tool for the ILECs to defeat competitive entry, and Congress certainly did not mean to create incentives for the ILECs to balkanize the telecommunications infrastructure through unnecessary proprietary technologies, when it adopted Section 251(d)(2)(A). Therefore, it is critical that the FCC construe this provision according to its terms to apply only to UNEs that are “proprietary in nature.”

Based on that interpretation, none of the UNEs placed by the FCC on the mandatory list in 1996 is subject to the “necessary” standard. None of the functionalities underlying ILEC-supplied UNEs are proprietary. Accordingly, the FCC should hold that the “necessary” standard for UNEs that are “proprietary in nature” does not apply to any of the network functionalities represented by the FCC’s pre-existing list of mandatory UNEs. Because no UNEs have been shown to be “proprietary in nature,” there is no need for the Commission to analyze in detail the type of showing that would satisfy the “necessary” standard.

***B. The “Impair” Standard Is Satisfied If Denying An Entrant Access To An ILEC-Supplied UNE Would Affect The Entrant’s Market Decisions***

The Supreme Court’s decision requires the FCC to implement the “impair” test in Section 251(d)(2)(B) by determining whether an entrant’s provision of service would actually be impaired absent the ILEC’s provision of a network functionality as a UNE. 119 S. Ct. at 736. The Supreme Court wanted to make sure that trivial differences between functionalities supplied by ILECs and others would not satisfy the “impair” standard, and that the Commission would apply the standard based on actual market conditions. Therefore, the Commission should clarify that only material differences between UNEs supplied by ILECs and non-ILECs can satisfy the “impair” standard, and that materiality will be judged in an actual as opposed to theoretical marketplace context.

***1. A New Entrant’s Perspective***

In theory, one entrant could be materially affected by denial of an ILEC-supplied UNE while another entrant might not. Without intending to propose a comprehensive definition of the average or typical entrant, Excel submits that the Commission should determine whether an ILEC-supplied UNE makes a material difference to an entrant from the vantage point of a carrier desiring to provide local services broadly throughout the United States as a new entrant to all types of customers in both high-density and sparsely-populated regions. It is, after all, of paramount importance that the Commission fulfill Congress’ intent that *all* Americans – not just high-volume business customers in urban areas -- should benefit from the 1996 Act. Not surprisingly, Excel believes that it fits that description given its desire to deploy local services to meet the needs of its widely-dispersed, primarily-residential customer base.

A key attribute of a new entrant desiring to provide local services broadly to a geographically-dispersed, largely residential customer base is that the entrant often must rely on the ILEC for all network functionalities to provide service. Particularly for an entrant like Excel which desires to serve residential as well as business customers and rural as well as urban markets, it is economically impossible to build its local facilities or rely significantly upon competitive local exchange carriers (“CLECs”) for the functionalities it needs to provide service. Even within high-density urban areas, such an entrant will desire to provide services on a ubiquitous basis to all types of subscribers, not just to large business customers in high-density downtown districts. In analyzing the materiality of differences between ILEC-supplied and external functionalities, the Commission must stand in the shoes of a new carrier who desires to compete with the ILEC for every potential customer.

## **2. *The Materiality Standard***

The Commission has asked parties to comment on the proper standard for determining materiality. *Second FNPRM* at ¶ 25. There is no formulaic or quantitative way for the Commission to determine materiality. Rather, from the vantage point of an entrant such as Excel, the Commission should ask whether an ILEC’s refusal to provide a UNE (or UNE combination) would affect an entrant’s market decisions – what market to enter, the length of the time-to-market period, what services and service packages to provide, what prices to charge, what region to serve, whether to employ redundant facilities, what type of customers to serve, how to interact with customers, and so on. If denying an entrant access to an ILEC-supplied UNE would affect one or more of these market decisions, then the UNE satisfies the “impair” standard and, without question, it should be placed on the mandatory list of ILEC-supplied

UNEs. By tying the “impair” standard to an entrant’s actual market decisions, the Commission will comply fully with the Supreme Court’s concerns while promoting Congress’ objective that UNEs should be available to help entrants enter the ILECs’ local markets.

***C. A UNE Satisfies The “Impair” Standard In The Absence Of A Fully Competitive Wholesale Market***

In implementing the “impair” standard, the Commission should keep in mind that carriers purchase UNEs not as ends in themselves, but as inputs for the provision of services to end-user subscribers. Hence, for example, in determining whether switching satisfies the “impair” standard, the question is not merely whether Excel can buy the same switch at the same price as from an ILEC, but whether Excel can use its own switch (or a third carrier’s switch) in the provision of services to subscribers with the same efficiencies and time-to-market period as it could achieve by purchasing switching from an ILEC as a UNE at cost-based rates. Congress wrote Section 251(d)(2)(B) to promote “the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.” Therefore, the FCC should apply the “impair” standard by determining whether an entrant needs ILEC-supplied UNEs to provide its menu of services to its target subscriber base within its chosen region.

The only meaningful way to apply the “impair” standard is by examining whether the entrant obtains a material benefit from using an ILEC-supplied functionality, or conversely whether it suffers a material disadvantage from using a non-ILEC supplied functionality. A new entrant will not be impaired in providing the services it seeks to offer if there is a fully-developed wholesale market that is able to supply sufficient external functionalities interchangeably with ILEC-supplied functionalities so that the entrant is truly indifferent to the source of its functionalities in making important market decisions.

### **1. *Interchangeable Functionalities***

In examining non-ILEC alternatives, the Commission should carefully consider whether the competitor-supplied functionality can be used interchangeably with ILEC-supplied UNEs in the provision of services to end-user subscribers. If melding ILEC-supplied and non-ILEC supplied functionalities into a single service offering would cause problems -- for example, higher costs, lower quality or service delays -- then the wholesale market for network functionalities is not workably competitive and the “impair” standard is satisfied. Even in cases where a non-ILEC functionality is ostensibly less expensive than the ILEC-supplied functionality, the “impair” standard is satisfied if the entrant cannot use that functionality seamlessly with other ILEC-supplied UNEs to provide services to subscribers. For a functionality to be removed from the mandatory UNE list, the requesting carrier must be truly indifferent as to whether the functionality is furnished by the ILEC or some other party.

### **2. *Sufficient Wholesale Substitutes***

In examining the alleged availability of alternative functionalities from non-ILEC sources, the Commission must carefully examine the extent to which those functionalities actually are available on a wholesale basis in the market today in sufficient quantities to serve as direct competitive substitutes for ILEC-supplied UNEs. The mere fact that a CLEC may possess alternative facilities does not necessarily mean that the CLEC is *offering* such facilities to other new entrants. Even in cases where a CLEC makes a substitute functionality available to other entrants, it may not be able to supply the quantities necessary to serve a new entrant, or there may be other limitations (*e.g.*, price, service area) that prevents the substitute from relieving the

market's dependence upon ILEC-supplied UNEs. Only a fully-functioning competitive wholesale market for network functionalities can justify removing a UNE from the mandatory list.

### **3. *Risk Factors***

Even in situations (entirely theoretical in today's market) where a working wholesale market exists for network functionalities, the "impair" standard will be satisfied so long as new entrants face greater risks when purchasing UNEs from alternative suppliers. A new supplier will not be able to provide an entrant with the same business certainty as an ILEC -- its network may be untested; its ability to meet an entrant's changing needs for new or additional functionalities may be unproven; the quality of its network maintenance and trouble-shooting capabilities may not yet be established; its staying power in the market may be unclear; and so on. Until the new supplier establishes a performance record over a reasonable period of time, an entrant will face significantly greater business risks when purchasing network functionalities from that supplier. The entrant's market decisions will reflect those risks -- for example, greater redundancy in network functionalities and suppliers as a risk-management strategy -- and the entrant's dependence upon ILEC-supplied UNEs will not be eliminated. Given the Supreme Court's instructions to examine the real-world context in which network functionalities are obtained and used, the Commission must take into account all the ways in which an entrant's market decisions could be affected based on its decision to obtain network functionalities from ILEC versus non-ILEC sources.

***D. All Current UNEs Satisfy The “Impair” Test And Should Remain On The Mandatory List***

There may come a day when applying the “impair” standard presents the Commission with a difficult task, but that day is not yet even on the horizon. The ILECs’ local exchange networks still embody profound economies that no CLECs, individually or in the aggregate, can come close to replicating. Excel operates in many regions of the country, and provides service to residential and other types of low-volume customers, where it does not have access to any alternative local exchange telecommunications facilities. Dance Affidavit at ¶ 5. For a large segment of its customer base, Excel can provide local telephone services by themselves or as part of an integrated service package only through UNE combinations provided by ILECs at cost-based rates. Dance Affidavit at ¶ 7. Therefore, the “impair” standard plainly is satisfied for the large majority of Excel’s customer base.

Further, even in higher-density areas where some CLECs have built alternative facilities, Excel’s dependence on ILECs for essential network functionalities is reduced only marginally, if at all. The nascent emergence of alternative networks has not come close to establishing a fully-functioning wholesale market for network functionalities with the capacity to serve all new entrants, and the ILECs have yet to develop the provisioning systems necessary for entrants to use external functionalities seamlessly and interchangeably with ILEC-supplied UNEs. Dance Affidavit at ¶ 5. In terms of its salient market decisions -- namely, what markets it can enter, what services it can provide, the delay before it may initiate service, the prices it charges, the types of customers it serves, the geographic scope of its service offerings -- Excel and other entrants remain dependent upon ILEC-supplied UNEs even in the most densely-populated urban areas for the provision of competing local services broadly to end-user subscribers.

Based upon current market conditions, and in full compliance with the Supreme Court's desire for the Commission to determine actual as opposed to theoretical impairment, the Commission should conclude that each of the UNEs adopted in this proceeding in 1996 satisfies the "impair" standard and must remain on the mandatory list. Those UNEs are the network interface device, local loops, switching, transport, operations support systems, signalling and call-related databases, and operator services and directory assistance. Without non-discriminatory access to these UNEs alone and in combinations at cost-based rates, Excel cannot enter the local market to provide one-stop-shopping packages to its largely residential customer base.

***E. The Commission Must Confirm That Entrants Can Obtain And Use UNEs From ILECs In Pre-Existing Or New Combinations Without Paying Penalties***

Most Americans will never benefit from local competition unless the Commission confirms that entrants may obtain and use UNEs from ILECs in any technically feasible combinations -- pre-existing or new -- in order to provide telecommunications services. For a carrier such as Excel, the ability to provide local services entirely through UNE combinations is critical to its ability to offer one-stop-shopping packages to its current customer base. As noted above, Excel serves primarily residential customers that are widely dispersed among all States and in all types of regions -- urban, suburban and rural. Dance Affidavit at ¶ 2. In many of these areas, and for most of these customers, Excel has no realistic alternatives for providing competing local services other than through UNE combinations. It is infeasible for Excel to build last-mile connectivity to its widely-dispersed customer base, and only a small portion of its subscriber base exists in regions where there are any alternative network facilities. Dance



Affidavit at ¶¶ 4-5. Further, Excel was compelled to reject local exchange resale as a long-term local entry strategy after an in-depth business and operational analysis. Dance Affidavit at ¶ 6. The only way that Excel can sustain local market entry in competition with the ILECs to serve its entire customer base is through UNE combinations (loops, switching, and transport) provided by ILECs at cost-based rates. Dance Affidavit at ¶¶ 7-8.

Excel's legal entitlement to UNE combinations cannot be reasonably disputed. Section 251(c)(3) states that "[a]n incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." 47 U.S.C. § 251(c)(3). As did the Commission itself, the Supreme Court rejected the ILECs' contention that entrants must supply some of their own network functionalities to preserve the statutory distinction between UNEs and total service resale. The Court held that "the 1996 Act imposes no such limitation; if anything, it suggests the opposite, by requiring in Section 251(c)(3) that incumbents provide access to 'any' requesting carrier." 119 S. Ct. at 736. The Supreme Court affirmed the "all elements" rule whereby entrants may provide service exclusively through UNEs, and it reinstated the Commission's requirement in Rule 315(b) that ILECs must make the "entire preassembled network" available to entrants through UNE combinations at cost-based rates. *Id.* at 736-37; 47 C.F.R. § 51.315(b). Therefore, Excel and other entrants are legally entitled to non-discriminatory access to all technically-feasible UNE combinations at cost-based rates. The Commission should take this opportunity to re-affirm its commitment to bringing local competition to all Americans in all regions of the country through all technically-feasible UNE combinations.

Unfortunately, there remains one inadvertent remnant of the Eighth Circuit's misguided decision to strike down the Commission's combination rules in *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997). That Court struck down not only the requirement for pre-existing combinations (Rule 315(b)), but also the requirements for new combinations (Rules 315(c)-(f)). Although the Supreme Court categorically rejected the 8th Circuit's legal reasoning and statutory interpretation, it formally reinstated only Rule 315(b) because the other rules were not directly before it on appeal. The Commission and other parties have sought to remove that anomaly by asking the 8th Circuit to reinstate or remand Rules 315(c)-(f).<sup>1</sup> Should the 8th Circuit remand those rules, Excel urges the Commission to reinstate them expeditiously or, in the event the matter is not fully resolved, to adopt new rules requiring ILECs to provide UNEs in any combinations where technically feasible.

In order to prevent ILECs from defeating entrants' legal entitlement to pre-existing UNE combinations under Rule 315(b), the Commission should clarify that the rule broadly entitles an entrant to provide any service to any customer through a UNE combination if the ILEC provides or uses that combination anywhere in its local network. The ILECs should not be able to evade their statutory and regulatory obligations through hyper-technical rule interpretations, such as by arguing that there are no pre-existing UNE combinations for customers who are new to the area, or that the obligation does not apply to subscribers moving from one CLEC to another CLEC. If the ILEC has previously supplied or used a UNE combination anywhere in its network for any service or customer, then the ILEC should be

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<sup>1</sup> See "Response of Federal Respondents to Local Exchange Carriers' Motion Regarding Further Proceedings On Remand And Motion For Voluntary Partial Remand," filed by FCC and United States, No. 96-3321 (and consolidated cases), March 2, 1999 (8<sup>th</sup> Circuit); "Motion For Reinstatement Or, In The Alternative, For A Remand Of The Record To The FCC," filed by CompTel, No. 96-3321 (and consolidated cases), March 3, 1999 (8<sup>th</sup> Circuit).

required to provide that same combination upon request to new entrants for any service they wish to provide to any customer they wish to serve.

Similarly, the Commission must adopt a rule, or at least issue a clarification, that ILECs cannot defeat an entrant's legal right to UNE combinations through monetary penalties such as "glue" charges. In several states, ILECs have sought to defeat UNE combinations by imposing high charges for the actual (or notional) task of separating and reassembling network functionalities. Those penalties would be particularly effective in preventing entrants from providing competing local services to residential and other low-volume subscribers. *Dance Affidavit* at ¶ 7. The Commission should make certain that ILECs do not engage in the wasteful and unnecessary practice of physically separating and reassembling UNEs before providing them to an entrant as a UNE combination. Further, the ILECs should not be permitted to impose additional charges on UNE combinations above and beyond the aggregate UNE rates except as necessary to recover the forward-looking economic costs of performing necessary functions in an efficient manner.<sup>2</sup>

Further, the Commission should clarify that, in cases where a new entrant requests part of a pre-existing combination and it is technically feasible for the ILEC to comply with the request, Rule 315(b) requires the ILEC to provide the partial combination. For example, all ILECs today use or provide the so-called UNE platform (loops, switching and transport) as a pre-existing combination of network functionalities. As a result, entrants should be entitled not only to obtain the entire UNE platform from the ILECs at cost-based rates, but also to obtain a partial

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<sup>2</sup> Excel fully supports the request of CompTel and other parties that the Commission require ILECs to use the electronic "recent change" process for migrating customers from ILECs to CLECs (or from one CLEC to another). The "recent change" capability enables the loop and switching UNEs to be separated and re-combined efficiently without manual intervention. *See* "Broadening the Base: Combining Network Elements to Achieve Widespread Local Competition," CompTel White Paper, July, 1998.

combination (*e.g.*, loops and switching) at cost-based rates upon request. The Commission wrote Section 315(b) to prohibit the ILECs from providing partial pre-existing UNE combinations “[e]xcept upon request.” 47 C.F.R. § 51.315(b). When such a request is made, the Commission should make clear that ILECs are required to comply fully to maximize the ability of new entrants to use UNE combinations to provide competing local services.

Lastly, the essential role played by UNE combinations in enabling entrants to provide services to all Americans in all regions of the country underscores the importance of ensuring that any substitute functionalities from non-ILEC sources are fully interchangeable with the same functionalities provided by the ILECs. When a new entrant provides local services through a combination of loop, switching and transport UNEs, the entrant is dependent upon the ILEC for the *combination*, not merely for each UNE *individually*. Hence, even if the entrant can obtain one functionality from an alternative supplier, the entrant’s dependence upon the ILEC for the entire UNE combination is not reduced in the slightest unless (as is not the case today) the entrant can efficiently use the non-ILEC functionality seamlessly, interchangeably and without penalties in combination with the remaining two ILEC-supplied UNEs for the provision of services to subscribers. Without that, the entrant is still fully dependent on the ILEC for the entire UNE combination, and none of the combined UNEs can be removed from the mandatory list.

## **II. THE COMMISSION MUST ADOPT UNIFORM NATIONAL RULES ESTABLISHING A MINIMUM SET OF MANDATORY NETWORK ELEMENTS**

In the *Second FNPRM* (at ¶ 14), the Commission proposed that it should “identify a minimum set of network elements that must be unbundled on a nationwide basis.” Excel

strongly supports the Commission's tentative conclusion, and urges it to require all ILECs to offer the seven UNEs on the current mandatory list throughout the United States.

***A. The FCC Should Adopt Uniform National Rules***

National rules are necessary to give competitive entrants the business certainty they need to construct and implement business plans to enter local markets on a ubiquitous basis to provide local services to both business and residential subscribers. Dance Affidavit at ¶ 9. As the Commission knows from past experience, ILECs will gladly engage in litigation on a state-by-state, market-by-market, or even CO-by-CO basis to disrupt and prevent local entry. Entrants do not have the resources or the luxury of time to participate in this trench warfare with the ILECs, nor does such warfare promote the goals of the Act. Further, if the initial list of mandatory UNEs varies from region to region, or from ILEC to ILEC, entrants will be forced to construct a patchwork quilt of entry strategies to provide competing local services. Without a single entry strategy that they can employ nationwide, entrants will lose the administrative, business and operational economies from pursuing a single, integrated business plan. In the end, entrants would choose to enter only selected local markets, or no local markets at all, rather than endure the costs and burdens of seeking to enter local markets broadly throughout the country. As a result, a single set of rules identifying mandatory UNEs and the rights of carriers to obtain and use UNEs in all technically-feasible combinations is necessary to promote Congress' desire to bring the benefits of local competition to all Americans in all regions of the country. This result is fully consistent with the Supreme Court's decision, which required the Commission to implement the "necessary" and "impair" standards meaningfully, not to forsake the rules

necessary to promote the public interest in broad-based local competition throughout the United States.

The adoption of national rules also complies with the “impair” standard in Section 251(d)(2)(B). As noted above, there is no region in the United States where entrants are indifferent to the source of the network functionalities they need to provide local services to end-user subscribers. Even in the most densely populated urban areas, entrants do not have the ability to use ILEC-supplied and external functionalities interchangeably without material cost, operational, service and other consequences. Entrants continue to obtain benefits by using ILEC-supplied functionalities, while facing disadvantages from using external functionalities, in the provision of services to subscribers. While the level of competitive inroads by local providers may vary among regions and ILECs, nowhere do the conditions exist which would justify relieving the ILECs of the obligation to provide UNEs and UNE combinations to requesting carriers at cost-based rates.

Further, even were the Commission to determine that sufficient alternatives exist to remove entrants’ dependence upon ILEC-supplied UNEs in a few locations, the Commission can and should adopt uniform national rules. Section 251(d)(2) states that the Commission need only “consider” whether the “necessary” standard (if applicable) and the “impair” standard have been satisfied. Even if those standards are not satisfied everywhere, the Commission has the authority to determine that the compelling need for national rules to promote ubiquitous market entry outweighs the ILECs’ business interest in removing UNEs from the mandatory list in selected areas. In this proceeding, the record shows beyond doubt that entrants continue to depend upon the ILECs for the functionalities necessary to provide local services to the vast majority of all subscribers throughout the United States. The Commission should not be deterred

by the theoretical possibility of regional variations from adopting uniform national rules to promote the public interest.

***B. States Have An Important Role to Play In Identifying Mandatory UNEs***

Excel submits that the States must continue to play an important role in identifying which UNEs should be on the mandatory list. Initially, Excel agrees that States should be able to add UNEs to the list beyond those prescribed by the Commission. The FCC's uniform national list should be regarded as a minimum, not a cap. States have contributed significantly to the implementation of the 1996 Act in many areas, and they should be encouraged to play a similar role in the definition of mandatory UNEs.

In addition, Excel does not rule out the possibility that, at some point in the future, it might be possible to remove particular UNEs on a regional or ILEC-specific basis. However, in order to provide the business certainty that is necessary today for broad-based competitive entry, the Commission should require the ILECs to offer all mandatory UNEs for a minimum period of three years. If, after that period, an ILEC believes that one or more UNEs should be removed from the mandatory list for a specific region, the FCC should consider initiating a separate rulemaking to establish procedures and standards to govern such requests. Excel would not object to rules giving the States a significant role in determining whether to remove UNEs from the mandatory list after the initial three-year period, so long as the Commission adopts specific and comprehensive standards in advance and maintains ongoing close oversight and review. By establishing procedures and standards for the removal of UNEs from the mandatory list based on actual market conditions, the Commission would remove any possible doubt that it has complied fully with the Supreme Court's holding in *AT&T Corp. v. Iowa Utilities Board*.

### **Conclusion**

For the foregoing reasons, Excel submits that the Commission should adopt rules affirming the current list of mandatory ILEC-supplied UNEs, as well as the legal entitlement of all carriers to obtain and use any technically-feasible UNE combinations to provide services to subscribers.

Respectfully submitted,

EXCEL COMMUNICATIONS, INC.

By: 

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Its Attorneys

May 26, 1999



**AFFIDAVIT OF J. CHRISTOPHER DANCE  
ON BEHALF OF EXCEL COMMUNICATIONS, INC.**

1. My name is J. Christopher Dance. I am President of the Local Services Division of Excel Communications, Inc. ("Excel"), which has its main offices at 8750 North Central Expressway, Dallas, Texas 75231. My telephone number is 214/863-8210. Prior to assuming my present position in late 1998, I served as Executive Vice President and General Counsel of Excel.

2. Excel provides long distance, international and other telecommunications services to end-user subscribers. Excel is the fourth largest U.S. long distance carrier in terms of presubscribed lines. As of the end of 1998, Excel and its affiliated companies provided service to more than four million subscribers. Approximately 80% of Excel's subscribers are residential. Excel provides services to subscribers in every State, and Excel's customers are spread among urban, suburban and sparsely-populated areas. A significant proportion of Excel's subscribers reside in rural areas.

3. Beginning in 1997, Excel has committed significant internal resources to developing and implementing a business plan to enter the local market broadly throughout the United States to provide local services to its existing (and prospective) customer base. As part of those efforts, Excel has obtained CLEC certification in 41 States. Excel formally established a Local Services Division in December, 1998, which is scheduled to have approximately 500 employees by December, 1999 and approximately 1,000 employees by January, 2000. Excel is prepared to make an initial investment of \$400 million to provide local services broadly to its customer base.

4. Excel has determined that it is infeasible to build-out last-mile connectivity to its pre-existing customer base. Excel does not have the financial resources necessary to implement such a plan. Indeed, since Excel's subscriber footprint is the entire United States, it is likely that no company has such resources. Further, because Excel's customer base is widely dispersed geographically and primarily consists of residential and other often low-volume subscribers, it is economically infeasible to build-out last-mile connectivity to serve Excel's current customers even if Excel had sufficient financial resources to do so.

5. Excel has determined that it is infeasible to rely upon non-ILEC suppliers of network functionalities for the provision of local services to its current customer base. Excel undertook a systematic and thorough study of the actual availability of such functionalities from non-ILEC suppliers in today's marketplace. That study showed that there are no current alternative telecommunications networks able to provide any of the functionalities (*e.g.*, loops, switching, transport) that would be necessary to provide local services to the large majority of Excel's current customer base. Further, that study showed that no CLECs anywhere offer Excel the ability to bypass ILEC-supplied functionalities altogether, and the systems necessary to permit Excel to meld ILEC-supplied and CLEC-supplied functionalities interchangeably into retail service offerings without paying penalties (*e.g.*, cost, quality, or time-to-market) do not yet exist anywhere.

6. Excel has determined that it is infeasible to rely upon local exchange resale for the long-term provision of local services to its current customer base. Excel undertook a systematic and thorough study of the local exchange resale arrangements available from ILECs in multiple

States where Excel has existing customers. The wholesale discounts made available by ILECs do not provide a sufficient margin to sustain long-term entry into the local market broadly throughout the United States to serve Excel's current customer base.

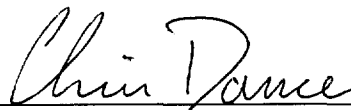
7. For the foreseeable future, the only way that Excel will be able to sustain long-term entry into the local market broadly throughout the United States to provide local services to its current customer base is through mandatory unbundled network elements ("UNEs") provided by ILECs in combinations (loops, switching, transport) at rates based on forward-looking long-run incremental costs. Because Excel's customer base consists largely of residential subscribers who often have relatively low traffic volumes, and because Excel has a low density of subscribers over a particular geographic areas, Excel will not be able to provide local services to those customers through UNE combinations if the ILECs can impose monetary penalties upon UNE combination users, such as "glue" charges, above and beyond the TELRIC-based rates for the combined UNEs.

8. Based upon its history and experience as a provider of domestic and international services on a geographically dispersed basis, Excel has concluded that UNE combinations at cost-based rates are necessary for it to provide broad-based competition to the ILECs for all types of customers. UNE combinations are particularly necessary for residential and other low-volume customers, as well as subscribers in rural and other sparsely-populated areas. If the FCC adopts rules that enable Excel to provide local services entirely through ILEC-supplied UNE combinations, Excel has established a business plan and organizational infrastructure to proceed

rapidly to introduce local competition broadly throughout the United States to serve its current (and prospective) customer base.

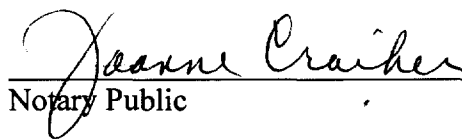
9 Uniform national rules on mandatory UNEs and UNE combinations are a prerequisite for Excel to implement its business plan to provide local services broadly throughout the country to a primarily residential customer base pursuant to a rapid, efficient roll-out. Because its customer base is widely-dispersed on a geographic basis and consists of many low-volume subscribers, Excel will not be able to cost-justify ubiquitous entry if its entry costs are inflated by the need to develop multiple entry strategies for different regions, or by the prospect of protracted, state-by-state litigation with ILECs to secure access to the necessary UNE combinations are cost-based rates.

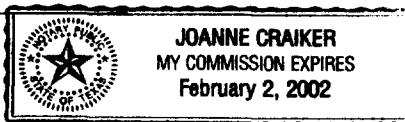
Executed this 25<sup>th</sup> day of May 1999



J. Christopher Dance

SWORN TO and subscribed before  
me this 25<sup>th</sup> day of May, 1999

  
Notary Public



My Commission expires: 2-2-02

**CERTIFICATE OF SERVICE**

I, Marlene Borack, hereby certify that on this 26th day of May, 1999, a copy of the foregoing **COMMENTS OF EXCEL COMMUNICATIONS, INC.** was delivered by hand to the following:

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